# STATE OF MICHIGAN
# IN THE SUPREME COURT

STEVEN T. ILIADES and
JANE ILIADES, Husband and Wife,

Plaintiffs-Appellees,

vs.

DIEFFENBACHER NORTH AMERICA INC,
A Foreign Corporation,

Defendant-Appellee.

Supreme Court No. 154358
Court of Appeals No. 324726
LC No.: 12-129407-NP
(Oakland County Cir. Court)
Hon. Martha D. Anderson

/

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## PLAINTIFF'S BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

## EXHIBITS

## CERTIFICATE OF SERVICE

## STATEMENT REGARDING JURISDICTION

Plaintiffs agree that the Court has jurisdiction, in its discretion, to grant leave to appeal to review a decision of the Michigan Court of Appeals on appeal from a circuit court summary disposition decision, MCR 7.303(B)(1).

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## STATEMENT OF QUESTIONS PRESENTED

**I. DO THIS CASE, AND THE SUMMARY DISPOSITION ARGUMENT PRESENTED, WARRANT PRE-TRIAL SUPREME COURT REVIEW?**

**PLAINTIFFS/APPELLANTS ANSWER "NO"**

**II. DID THE APPELLATE COURT CORRECTLY HOLD THAT THE TRIAL COURT ERRED IN GRANTING SUMMARY DISPOSITION TO DEFENDANT UNDER MCL 600.2947(2), AS THE CIRCUIT COURT RULING CONFUSES COMPARATIVE NEGLIGENCE WITH "UNFORESEEABLE MISUSE", AND IT IS NOT "UNFORESEEABLE MISUSE" FOR A PRESS OPERATOR TO REACH INTO THE OPERATING AREA TO RETRIEVE PARTS AT THE END OF THE PRESS CYCLE WHILE THE "LIGHT CURTAIN" IS SUPPOSED TO PREVENT THE PRESS FROM RECYCLING?**

**PLAINTIFFS/APPELLANTS ANSWER "YES"**

## COUNTER-STATEMENT OF FACTS

### Overview

Plaintiff[1] was crushed while operating a rubber injection molding press at work. The press was designed and manufactured by Defendant Dieffenbacher, NA ("Defendant" or "Dieffenbacher").

This product liability suit was dismissed on summary disposition motion under MCR 2.116(C)(10) ("no genuine issue as to any material fact"). In the trial court's view, by reaching into the operating area of the press to retrieve finished parts that fell to the floor, Plaintiff engaged in "unforeseeable" "misuse" barring suit under MCL 600.2947(2) [Ex. B (granting summary disposition "for the reasons stated on the record"); Ex. C (transcript of argument on motion), pp. 16-17].

On appeal, the Court of Appeals reversed (Ex. A). It held that it was an issue of fact for the jury whether Plaintiff engaged in "unforeseeable" "misuse" that would bar recovery under MCL 600.2947(2). Defendant now seeks pre-trial Supreme Court review of the appellate decision allowing the case to go forward.

### The Press At Issue

Plaintiff was injured while using a Dieffenbacher DU 500 rubber injection press which was called "Press #25" at Flexible Products, Plaintiff's employer. This press was purchased by Flexible Products in 1994. At that time, it was equipped with front safety

[1] This suit was brought on behalf of Steven Iliades, the man injured by the press, and his wife, Jane Iliades, for loss of consortium. The singular term "Plaintiff" refers to Mr. Iliades.

doors. The Dieffenbacher engineer, Mr. Brumaru, described the purpose of the safety doors (Brumaru dep., Ex. F, pp. 34-35):

> "Q. What was your understanding as the purpose of those safety doors?
> A. Safety doors?
> Q. Right. What's the purpose behind them?
> A. To protect the operator from accidently entering the working area of the press.
> Q. So it's to protect the operator from accidently entering the press while its operating?
> A. Yes
> Q. Preventing them from being injured as a result of the press coming down on them?
> A Or coming down or up.
> Q. Either way?
> A. Yes."

This safety feature was used, knowing that, "someone could get in the press and remove the materials" (Brumaru dep., p. 47). The front safety door prevented the operator's body from getting inside at the point of operation (Brumaru dep., p. 40). However, maintenance issues and customer dissatisfaction with the barrier guard led to a change in the point of operation guarding in about 1997 (Brumaru dep., pp. 33-35, 75). During that time frame,[2] Dieffenbacher designed and installed, at the expense of Flexible Products, a "light curtain" guarding system (Brumaru dep., pp. 33-35, 45-46, 69). The retrofitting or upgrading to a light curtain was performed on "Press No. 25" and other Dieffenbacher presses.

[2] There is a small measure of uncertainty about some specifics, since Defendant got rid of documentation about its rubber presses when it discontinued producing that product line (Brumaru dep., pp. 69-70).

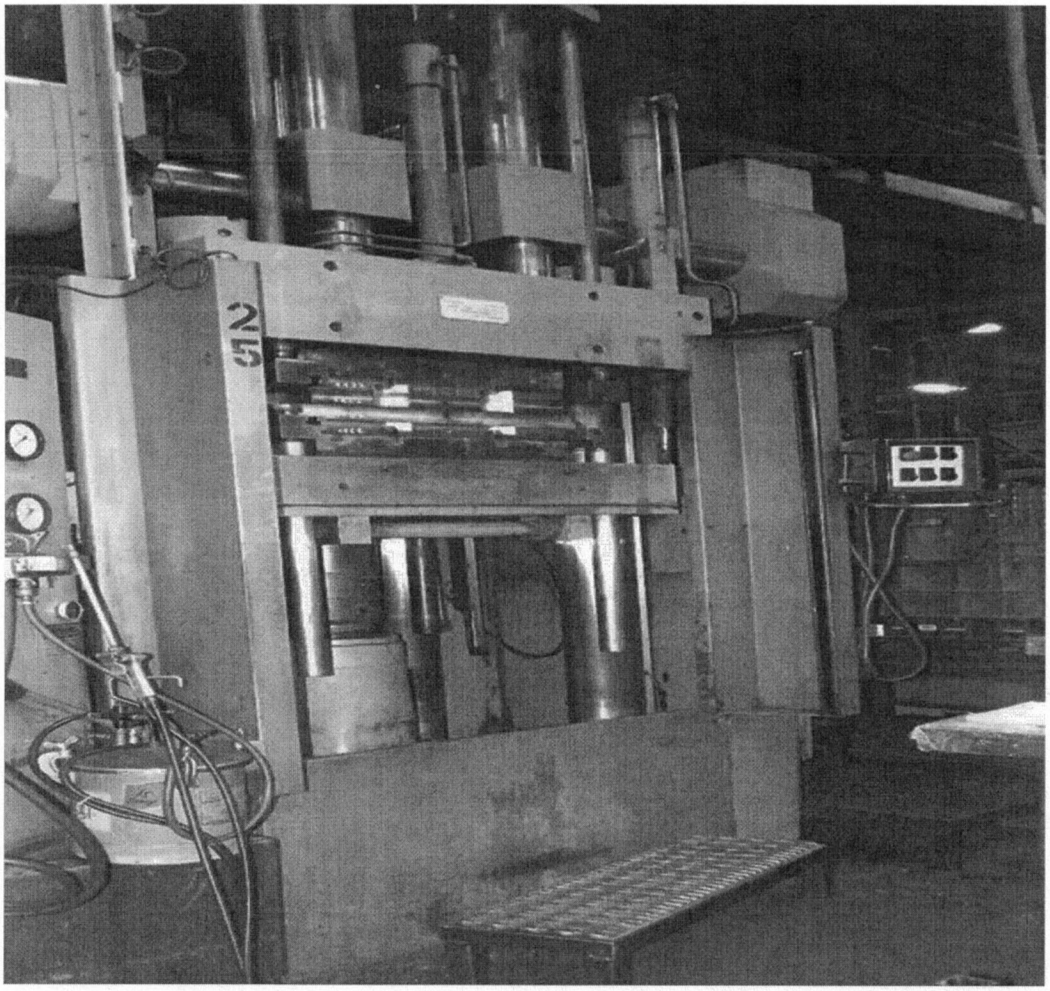
Mr. Brumaru was versed in press manufacture, guarding, safety concerns and the like. He was familiar with the reality of some customers bypassing safety guards altogether (Brumaru dep., p. 37). The purpose of the light curtain was "to guard the press" (Brumaru dep., p. 40). In designing the light curtain, "I tried to imagine, foresee, every single possibility where someone can even try to kill himself" (Brumaru dep., p. 73).

In operation, the 500 ton rubber injection molding press would cycle when the top plate came down and compressed against the bottom plate, heating the rubber (Preston dep., Ex. G, pp. 22-23). Once the press cycle ended and the press stopped, the operator would remove the rubber manually (Preston dep., pp. 18, 21). The operator can only enter the press from the front (Preston dep., pp. 27-28). In going into the point of operation, the press operator is supposed to make sure that the press is stopped (Preston dep., pp. 30-31; Michalak dep., Ex. H p. 30).

The work sometimes entailed "going in the press" (Whiteside dep., Ex. I, p. 14). The safety curtain is, a "safety device to prevent the press from moving while you're in there..." (Whiteside dep., p. 15).

The press has a selector switch so that it can be operated in either automatic or manual mode (Michalak dep., p. 42). In manual mode, every movement of the press needs to be selected with either two push buttons, a joy stick or one push button for each step of the press cycle (Michalak dep., p. 39).

On the following page is a photograph of the press with the light curtain installed.



**Plaintiff's Injury**

On June 10, 2011, on the evening shift at Flexible Products, Plaintiff was working on Press 25 for the first time. When the cycle was completed, and rubber parts formed, he would remove the finished parts with a tool, sometimes referred to as a parts grabber, to inspect the parts (Iliades dep., Ex. K, pp. 50-51, 103-105). When the cycle stops. "[t]hen you go in to retrieve your parts" (Green dep., Ex. J, p. 17).

That evening, after the press completed its cycle, Plaintiff saw that some of the parts had popped off the plate on to the floor inside the press (Iliades dep., p. 105). Using

the part grabber tool, Iliades reached into the press to remove the parts, crossing the light curtain, which was supposed to disable the press (Iliades dep., p. 105; Green dep., p. 28).

Most of the presses at Flexible Products, operating in "manual' mode, cannot restart when the light curtain is crossed until the operator manually re-starts the machine with a reset button (Iliades dep., p. 102, 128; Green dep., p. 28). However, Press No. 25 was set up so that it would automatically restart, without being reset by the operator, when the "light curtain" sensed that the operator was no longer in the danger area (Green dep., pp. 15, 21).

As Plaintiff reached in to retrieve the fallen parts with the parts grabber, he got below the light curtain, causing the press to automatically recycle, trapping his upper torso in the press (Green dep., p. 31). He remained trapped in the press for about fifteen minutes as other workers struggled frantically to free him, unable to move the upper plate due to the light curtain (Iliades dep., p. 57; Green dep., pp. 8-10, 15-18). As a result of being crushed in the press, Plaintiff suffered fractured vertebrae, crush injuries to L1 to L4, second and third degree burns, PTSD, chronic pain disorder, major depression and permanent disfigurement.

**The Lawsuit**

Plaintiff filed this suit in Oakland County Circuit Court (Ex. L). In essence, it alleges that Dieffenbacher was negligent in the design and manufacture of the press and its safety features.

## The Opinions of Plaintiff's Expert

The case was reviewed by Ralph Lipsey Barnett, an engineer who completed the course work for a doctorate in mechanics, has decades of experience, and numerous scholarly publications (Ex. M, Barnett c.v.). At his deposition (Ex. N), Mr. Barnett explained that the retrofitted light curtain should have provided equivalent or greater protection than the original interlock barrier guards (Barnett dep., p. 57).

In his opinion, the use of a light curtain to guard a dangerous motion (in this case the internal movement of the press), requires a manual reset to ensure that the operator is not still in the dangerous area of the press (Barnett dep., pp. 29-30):

> "Q. Is that to say that the design of the light curtain described in this manual is such that once it's installed, resetting it requires activating a control device?
>
> A. If you're using it as a guard. Let's see. This light curtain is an example of a modern light curtain, which means that it can be used in two different ways. The primary way is when it's used as a barrier guard, you are only able to stop the machine with the light curtain. You then can get permission after you withdraw something from the light curtain. You get permission to run the machine again, but in order to run the machine, you have to hit a start button, a reset button, something else. But also this light curtain could have been used as the total on and off. You reach through, you take your hands off, it starts, and then they have a special name for that, and I'll give you the name if I can go through the files, but this light curtain can be used, you know, in either mode."

Mr. Barnett offered the following opinions, by way of Affidavit (Ex. O), in response to Defendant's Motion for Summary Disposition:

5. The original Dieffenbacher vertical injection molding machine provided a proper point-of-operation guarding system that would have prevented the plaintiff's accident and injury regardless of the machine's operation mode. Even a deliberate attempt to injure one's self would be frustrated by the initial safeguard design. This level of protection is called for by every code, standard, research paper and safety organization.

6. Dieffenbacher failed to design a front hinged interlocked guarding system that maintained the structural integrity required for long term proper functioning. The front hinged and interlock barrier guard was not sufficiently robust or reliable to accommodate the normal press activity through the front of the machine. The rear guarding system is not used with anywhere near the frequency as the front safeguarding system.

7. Dieffenbacher replaced only the front interlocked guarding system with a Leuze Lumiflex Dialog safety light curtain. They improperly designed the circuitry to create an elaborate Stop/Start Device instead of a Safety Device.

8. The improperly designed circuitry by Dieffenbacher violated the Leuze Lumiflex Dialog installation instructions. The improperly wired light curtain violated the MIOSHA rules. It violated the NFPA standard 79, Electrical Standard for Industrial Machinery, promulgated for the proper safety design of all interlock systems such as light curtains. The Dieffenbacher system design of the light curtain violated the British Standard, and by extension the standard for the entire European Union, by producing an on/off system as opposed to a point-of-operation safeguard system. The Dieffenbacher safety light curtain design is unsupportable by the safety community.

9. The modified Dieffenbacher vertical injection molding machine no longer presented a point -of-operation safeguard.

* * *

11. The Dieffenbacher design violated the principle of uniform safety. The rear hinged guards were designed as a Safeguard; the front light curtain was designed as a Start/Stop station. Furthermore, some of the Flexible Product machines used safety light curtains and some of them, such as unit 25, were designed as Start/Stop stations. This error was identified many decades ago in the ANSI B 11.1 Standards for Mechanical Power Presses (see Appendix A).

12. The defense has improperly stated that the plaintiff climbed inside of the Dieffenbacher machine during a normal operating cycle. In fact, the plaintiff entered a stationary machine to perform a "routine maintenance" task as opposed to a major maintenance operation requiring Lockout/Tagout. A proper functioning point-of-operation system is essential for perform "routine maintenance."

13. The following table describes the internationally accepted safety hierarchy developed by the National Safety Council.

**TABLE 1**

**SAFETY HIERARCHY – 1985**

| | |
|---|---|
| FIRST PRIORITY: | **ELIMINATE THE HAZARD AND/OR RISK** |
| SECOND PRIORITY: | **APPLY SAFEGUARDING TECHNOLOGY** |
| THIRD PRIORITY: | **USE WARNING SIGNS** |
| FOURTH PRIORITY: | **TRAIN AND INSTRUCT** |
| FIFTH PRIORITY: | **PRESCRIBE PERSONAL PROTECTION** |

> Training is listed as priority number four whereas Safeguarding is listed as priority number two.
>
> * * *
>
> 15. Over the years the safety community has adopted a legal principle which states that, 'A manufacturer has a non-delegable duty to design proper safety systems.' Dieffenbacher has violated this notion with an expectation that Flexible Products can counteract the effects of their improperly designed light curtain circuitry (Ex. K)."

**The Summary Disposition Ruling**

After the discovery summarized above, Dieffenbacher filed its motion for summary disposition under MCR 2.116(C)(10) ("no genuine issue as to any material fact"). Plaintiff filed his Brief in Response (Ex. P, without attachments).

The motion was argued September 17, 2014 before Hon. Martha Anderson, Oakland County Circuit Court Judge (Ex. C, transcript of argument). At the conclusion of the argument she granted the motion, finding that, "plaintiff, Steven, misused the moulding press machine in question, and furthermore, that plaintiff, Steven's, misuse of the subject moulding press machine at the time of the subject incident, was not reasonably foreseeable by defendant, Dieffenbacher" (Ex. C, p. 16). In support of this conclusion, the Court cited evidence that Plaintiff had acted contrary to his training and safe practice in leaning into the press while the press was in "automatic" mode without using controls other than the light curtain to protect against recycling (Ex. C, pp. 16-18).

Plaintiff later filed a Motion for Reconsideration (Ex. Q). That motion was denied (Ex. D) and Plaintiff appealed.

The appeal was heard by a Court of Appeals panel comprised of Judges Ronayne Krause, Jansen and Stephens. The Court released its Opinion on July 19, 2016 (Ex. A).

The critical statute, MCL 600.2947(2), states:

> " A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court" (emphasis added).

Thus the statutory defense, to apply, required Defendant to show both "misuse" and that the misuse was not "reasonably foreseeable".

The majority (Judges Ronayne Krause and Stephens) presumed that Plaintiff "misused" the press when he reached in (Ex. A, p. 5, fn. 1). But, it concluded that reaching into the press to retrieve a rubber piece which the machine failed to eject was "reasonably foreseeable" (Ex. A, pp. 3-5).

> " The evidence strongly indicates that some manner of reaching into presses was simply how they operated, and consequently some risk of injury is indeed foreseeable. The entire point of the light curtains was, indeed, to prevent exactly that."
>
> * * *
>
> " It is worth noting that there was clear testimony to the effect that the light curtain installed on Press Number 25 did not work properly and would clear even if something was traversing the press opening, a 'surprising' fact known to a regular operator of that press, but plaintiff had never worked on that press before. With that one exception, the testimony was uniform that light curtains had never failed. Furthermore, the testimony that light curtains were not 'off switches' was somewhat ambiguous given the

more or less contemporaneous testimony from the same witnesses that the light curtains did stop the presses and, indeed, that was their purpose. It appears that the reference was that light curtains did not shut down the presses."

* * *

"[T]he evidence at least raises a genuine question of fact whether finished products could be practically removed from the presses without reaching into them. Plaintiff clearly exposed himself to a risk of a much greater *degree* of harm than merely sticking an arm inside. But the *nature* of that conduct was exactly the same: assuming that he would be protected from the press by the light curtain, a safety device that gave every impression of being reliable. Indeed, plaintiff's testimony suggested that for the most part, the light curtains were if anything *too* sensitive. Furthermore, defendant's electrical engineer testified that defendant was actually aware that clients were bypassing the safety doors that preceded the light curtains in the pursuit of continuing operations; it was thus actually aware that its clients incentivized operational efficiency at the cost of safety.

The evidence shows that plaintiff did not *completely* enter the press, the light curtains were supposed to have kept the press from cycling as long as some part of his body was sticking out of the press opening, and whether or not doing so was wise or even formally permitted, it was common practice to rely on the light curtains as sole safety devices. There is no testimony from any of his co-workers that he would have had reason to know that the light curtain on that particular press would be cleared if one got *between* the light curtain and the press, or that such an occurrence was even possible. We do not find, on this record, that plaintiff obviously committed gross negligence. In contrast, defendant knew that its customers might bypass safeties if doing so made press operation more efficient and that parts could not be retrieved from the press without *some* amount of entry

> thereinto. It might be reasonably expected that, in light of Flexible Products being one of defendant's biggest customers, defendant would have some familiarity with how the presses were actually used. It is no great cognitive leap to conclude that defendant should reasonably have anticipated that press operators might reach inside presses and, in so doing, not take the additional time to use any safety features other than the light curtain. As noted, the statute does not set a standard for egregiousness of misuse, but rather foreseeability." (footnotes omitted).

Judge Jansen dissented, explaining:

> "I agree with the majority that some manner of accidental or nonaccidental reaching into a press while the press is in automatic mode was reasonably foreseeable, which is why the light curtain was installed. However, I disagree with the majority's conclusion that plaintiff's act of partially climbing into the press while the press was in automatic mode was reasonably foreseeable."

Dieffenbacher now seeks pre-trial Supreme Court review. Plaintiff argues that the issue does not warrant Supreme Court review (Issue I) and that the Court of Appeals majority applied the appropriate analysis correctly (Issue II).

## LAW AND ARGUMENT

### I. THIS CASE, AND THE SUMMARY DISPOSITION ARGUMENT PRESENTED, DO NOT WARRANT PRE-TRIAL SUPREME COURT REVIEW

Defendant complains about the ultimate outcome of the Court of Appeals decision, a trial. Apart from the legal merit, it pays scant attention to the primary inquiry of any Application for Leave: whether the issue is of such novelty and statewide significance that the considered decision of a fair and thoughtful Court of Appeals panel is not enough, that Supreme Court review is required. Defendant's Application falls flat on that score.

This case involves a Rule 2.116(C)(10) ("no genuine issue") summary disposition motion, hardly unusual in modern civil procedure. The appeal also involves review standards that are well-established and beyond serious dispute: "light favorable to the non-movant", "credibility of expert testimony is for the jury", and the like. While there is room for Defendant to quarrel with the result, the structure of the legal issue is commonplace and not of special jurisprudential significance.

To be sure, the facts of this case are interesting and the technical details perhaps fascinating for engineers. Still, (C)(10) summary disposition outcomes are driven by unique facts. The Circuit Court, then the Court of Appeals, are the judicial strata for weighing evidence. In this sense, summary disposition appeals are uniquely ill-suited to Supreme Court review. As this Court explained in People v Tyrer, 385 Mich 484 (1970), dismissing the appeal because leave was improvidently granted:

> "If a bi-level appellate system is to work, it is necessary for the Supreme Court to resist the temptation, always present among men trained in the law, to become involved in the fascinating work of the trial and intermediate appellate courts."

In addition, there is no "final judgment", just a ruling that calls for a trial. The demands on Justices to perform administrative responsibilities, decide motions, decide Applications, attend oral arguments and write scholarly Opinions, and the finite resources of this Court, help define the limited judicial energies left for cases seeking pre-trial review. To grant leave to appeal in any interlocutory matter is *ispo facto* to reduce the quantity or quality of justice afforded to those appealing from final judgments. Simply as a matter of allocating precious judicial resources, those resources must ordinarily be directed toward final judgments rather than interlocutory orders.

Adherence to the practice ordinarily requiring a final judgment before appellate review helps keep the appellate docket manageable. If, for example, the parties come to realize that it is in their best interests to resolve their differences, there will never be any need for this Court to decide the issues which Defendant now seeks to present. Likewise, if Defendant were to prevail at trial, there would be no need for it to pursue an appeal. It would be improvident to commit the already sorely-taxed resources of this State's highest Court to a case which may proceed to a satisfactory resolution if the parties are left alone.

If this Court were to grant leave to appeal to review the summary disposition ruling, it would not avoid the possibility that all the other issues of the case, including those which develop during trial, will again be presented to the Court of Appeals and this

Court after final judgment. Judicial efficiency is far better served by review of all issues at one time rather than repeated piecemeal decisions.

Against this array of reasons why leave should be denied, Defendant offers no real claim that it will sustain substantial harm by awaiting a post-judgment appeal of right except that denial of its summary disposition motion allows the case to continue. That is hardly noteworthy, as every summary disposition denial allows the case to proceed. A trial on the substantive merits is exactly what our system of justice strives to offer. The prospect of a decision on the merits is a far cry from "substantial harm".

The fact that denial of a summary disposition motion requires a defense at trial in this case leaves Defendant in no different position than that of any other movant that loses one of the hundreds of dispositive motions decided every week across the State. That is scarcely a basis for pre-trial Supreme Court review.

Defendant rests its Application on the supposition that the Court of Appeals decision disturbed virgin soil when it interpreted and applied the "reasonably foreseeable" statutory language to this press crush case. If this were so, it would only show that "reasonably unforeseeable" is an inquiry which hinges on the unique facts of particular cases, a ruling that has little if any application beyond the facts of this case. And, it would show that the meaning of "reasonably foreseeable" is sufficiently well settled as to present no blazing controversy. The appellate court's performance of its error-correction function in a fact-specific summary disposition case presents no issue warranting extraordinary Supreme Court review.

The notion that a manufacturer is not liable for "unforeseeable" "misuse" has been part of Michigan's common law product liability jurisprudence for decades. The meaning of that phrase has been addressed and elucidated in numerous published opinions and the statute in issue simply codifies that common law doctrine. It is fallacious for Defendant to contend that the phrase "reasonably foreseeable" demands Supreme Court clarification.

In sum, the Application presents no compelling reason for extraordinary Supreme Court review. The Application should be denied for that reason.

## II. THE APPELLATE COURT CORRECTLY HELD THAT THE TRIAL COURT ERRED IN GRANTING SUMMARY DISPOSITION TO DEFENDANT UNDER MCL 600.2947(2), AS THE CIRCUIT COURT RULING CONFUSES COMPARATIVE NEGLIGENCE WITH "UNFORESEEABLE MISUSE", AND IT IS NOT "UNFORESEEABLE MISUSE" FOR A PRESS OPERATOR TO REACH INTO THE OPERATING AREA TO RETRIEVE PARTS AT THE END OF THE PRESS CYCLE WHILE THE "LIGHT CURTAIN" IS SUPPOSED TO PREVENT THE PRESS FROM RECYCLING

### A. Standard of Review

This appeal presents a procedural conundrum. MCL 600.2947(2) characterizes the "unforeseeable misuse" defense as a question for the court.[3] That is, however, a

[3] As the Order granting leave to appeal (Ex. D) limited the issues, and as the Court of Appeals ruling makes it unnecessary to the outcome, this Brief will not address the thorny constitutional question of whether the historic right to trial by jury, enshrined in Mich Const 1963, Art. I, §14, can be abolished by legislative fiat.

traditional issue of fact to be decided at trial by the jury. See e.g. the cases cited in sub-section B, infra.

The appeal arises from a summary disposition ruling under MCR 2.116(C)(10) ("no genuine issue as to any material fact"). For summary disposition purposes, the evidence must be viewed in a light favorable to the non-movant (Plaintiff). Weymers v Khera, 454 Mich 639, 640-647 (1997); Bertrand v Alan Ford, Inc., 449 Mich 606, 617-618 (1995); Thomas v Stubbs, 218 Mich App 46, 49 (1996); Hill v GMAC, 207 Mich App 504, 506-507 (1994). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." West v General Motors Corp, 469 Mich 177, 183 (2003).

The trial court seemingly adopted this approach. Her ruling claimed to "vie[w] the evidence in the light most favorable to plaintiffs" (Ex. C, Tr. 9/17/14, p. 16).

Assuming that "foreseeable misuse" is exclusively a judicial determination, it must ordinarily be based on testimony, in open court. Circumventing the trial process altogether can only be justified under traditional summary disposition standards. Thus, the issue is whether the facts and inferences, viewed favorably to the non-movant Plaintiff, leave no genuine issue of material fact.

This is consistent with the approach taken in Belleville v Rockford Mfg Group, Inc, 172 F Supp 2d 913, 918 (ED Mich, 2001). There, Judge Edmunds, exercising the judicial authority to decide the question, drew upon Shipman v Fontaine Truck Equipment Co, 184 Mich App 706, 713 (1990):

> "[O]ur reading of the decision suggests that where there is evidence presented of the manufacturer's knowledge of unsafe use, or that unsafe use is foreseeable, liability is not precluded."

At a bench trial, the trial court's findings of fact are reviewed to see whether they are "clearly erroneous". MCR 2.613(C); Sands v Sands, 442 Mich 30, 34 (1993); Draggoo v Draggoo, 223 Mich App 415, 429 (1997). A finding is "clearly erroneous" when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed", Tuttle v Highway Dept, 397 Mich 44, 46 (1976).

Part of this appeal involves the meaning of "unforeseeable" "misuse" in Michigan's product liability statutes. Issues of statutory construction present questions of law reviewed de novo. Shinholster v Annapolis Hospital, 471 Mich 540, 584 (2004).

### B. Legal Background

Those who sell products in Michigan have long been subject to the requirement that the product is fit for its intended or foreseeable purposes. Calling a plaintiff's conduct foolhardy or "misuse" does not abrogate the manufacturer's duty. The duty to make the product reasonably safe extends to so-called "misuse" as long as that conduct was "reasonably foreseeable". Ghrist v Chrysler Corp, 451 Mich 242, 247-248 (1996) (amputation of finger when press operator "reached into the press area to remove a part", 451 Mich at 244); Prentis v Yale Manufacturing, 421 Mich 670, 693 (1984); Laier v Kitchen, 266 Mich App 482, 488 (2005); Reeves v Cincinnati, Inc, 176 Mich App 181,

183, 190 (1989) (summary disposition reversed; plaintiff's hand crushed, "when a power press unexpectedly cycled").

A shockingly high number of reported product liability cases involve the absence of safety devices, or inadequate safety devices, to protect workers from amputations and similar life-changing injuries in the operational parts of industrial machinery. See e.g. Belleville v Rockford Mfg Group, Inc, 172 F Supp 2d 913 (ED Mich, 2001); Cacevic v Simplimatic (On Remand), 248 Mich App 670 (2001); Timmerman v Universal Box Machine, 93 Mich App 680, 682-683 (1979); Byrnes v Economic Machinery Co, 41 Mich App 192, 194 (1972); Coger v Mackinaw Products Co, 48 Mich App 113, 116 (1973).

Many of these cases arise specifically from injuries to press operators crushed while reaching into the press in the course of their employment. Ghrist; Reeves; Gregory v Cincinnati, Inc, 202 Mich App 474, 476 (1993) (hand crushed when, "Plaintiff was operating the machine when he dropped a piece of metal onto the floor [and] bent over to retrieve it"); Scott v Allen Bradley Co, 139 Mich App 665, 672 (1984) (sufficient evidence of foreseeability); Fredericks v General Motors, 411 Mich 712 (1981); Villar v E W Bliss, 134 Mich App 116 (1984); Bullock v Gulf & Western, 128 Mich App 316 (1983); Pippen v Denison, 66 Mich App 664, 668 (1976) (plaintiff's arm crushed "as plaintiff reached in to remove the casting"); Tulkku v Mackworth Rees, 406 Mich 615, 616-617 (1979); Gronlie v Positive Safety Mfg, 50 Mich App 109, 111 (1973).

These are just the reported cases. The list does not include unpublished opinions like Krol v Allied Products, Ct. of App. #175341, rel'd 8/16/96 (Ex. R).[4] Nor does it include similar injuries for which suit was never filed, or which were resolved before reaching the appellate courts.

In 1978, the Michigan Legislature enacted product liability statutes, MCL 600.2945 – MCL 600.2949, which were amended in 1995. As here pertinent, they codify the common law principle that a manufacturer is not liable for "misuse" which is not "foreseeable", but remains liable for "misuse" which is "foreseeable". In that regard, MCL 600 .2947(2) provides:

> "A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonable foreseeable are legal issues to be resolved by the court."

The term "misuse" is defined in MCL 600.2945(e):

> "'Misuse' means use of a product in a materially different manner than the product's intended use. Misuse includes uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller or another person possessing knowledge or training regarding use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances"

[4] Krol was a case in which Plaintiff's hand was amputated when the press recycled when Mr. Krol "reached in to remove" a part, as "the press required plaintiff to load and unload parts into the die between each press cycle".

In contrast to "misuse", "negligence" by the plaintiff is not a complete bar to recovery. The 1978 enactment included MCL 600.2949(1), which adopted a comparative negligence analysis by which fault by the plaintiff reduces the percentage of damages recoverable, but does not bar suit.

> " In all products liability actions brought to recover damages resulting from death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or the plaintiff's legal representatives, but damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff."

By 1995, MCL 600.2949(1) became unnecessarily redundant, and was repealed. By then, the Supreme Court had adopted comparative negligence in all negligence cases in Placek v Sterling Heights, 405 Mich App 638 (1979), and the Legislature had done the same by enacting MCL 600.6304(1) and (3).

With this background, we turn to the two dispositive issues: (1) whether the Plaintiff's conduct is "misuse" rather than "negligence" and (2), if so, whether it was nonetheless "foreseeable". The Court of Appeals correctly found that the events were "foreseeable", making it unnecessary to decide whether Plaintiff's use of the product was "misuse".

### C. The Trial Court Ruling Conflated Plaintiff's Comparative Negligence With Misuse

As the preceding discussion reflects, there is a critical difference between "misuse" (which, if unforeseeable, bars recovery despite the defendant's negligence) and

"comparative negligence" (which apportions the damage responsibility between the two negligent parties). The trial court erred in deeming Plaintiff's conduct "misuse" rather than negligent, an alternative rationale which supports the Court of Appeals outcome.

Plainly Mr. Iliades was using the press for the very purpose it was manufactured, to form rubber parts. He was reaching into the press to remove those parts, just as his job required, and just as the press operation required. In particular, he was retrieving a part that had been ejected by the machine, using the parts grabber provided for that purpose. In any normal sense of the word "misuse", Plaintiff was using the product for its intended or foreseeable purposes albeit, perhaps, in a negligent fashion. Even if he failed to use reasonable care ("negligence"), this does not transform use of the press for its normal purpose into "misuse".

The trial judge seized on evidence that Plaintiff had been trained to do the job in a safer fashion. Apparently the Court felt that the deviation from training constitutes "misuse" under the statutory definition which, read most favorably to Defendant, includes, "uses contrary to... instruction provided by [a] person possessing knowledge or training regarding the use... of the product".

The primary problem with characterizing "misuse" this broadly is that it obliterates the line between comparative negligence and misuse. Read in context, the "use contrary..." clause focuses on instruction about what to use the product for, not due care in using the product for a proper purpose.

As an example, assume a product liability suit alleging that an automobile brake was inadequate. If the brake was inadequate because the car was pulling a heavy bus

down a steep hill, contrary to a warning not to do so, this might constitute "misuse" in using the product for a purpose that it was not intended for [bearing in mind that "foreseeable misuse" analysis arises from the general obligation to make the product fit for intended purpose]. On the other hand, if the brakes failed in normal operation, while driving 5 miles over the speed limit, this might constitute comparative negligence since the use itself was intended, though accomplished negligently. Thus, returning to the language of MCL 600.2945, the phrase "uses contrary to a warning or instruction... regarding the use... of the product" refers to the use the product is put to, not negligence in performing an intended use.

While not phrased in this fashion, that is the essential approach taken in Tuttle v Yamaha Motor Corporation, Ct. of App. # 301776, rel'd 10/23/12 (Ex. S). In that case, the plaintiff fractured his leg when he extended it outward, instinctively, in an attempt to prevent tipping over in a recreational vehicle. The Court "recognize[d] that the warnings advised drivers or occupants to keep their hands and feet inside the vehicle at all times" (Ex. S, p. 6), then said:

> "We do note that the issue of Tuttle's fault – if any – seems more a matter of comparative negligence that could serve to potentially reduce an award as opposed to barring recovery completely. See MCL 600.2958 to 600.2960."

The same analysis applies here. Plaintiff's momentary inattention to safety instruction, while using the product for its intended rubber molding purpose, may be

comparative negligence, limiting the amount of recovery. It is not, however, a complete bar to recovery for Defendant's negligence.

### D. If Deemed "Misuse", Plaintiff's Conduct Was Nonetheless "Foreseeable"

Even if one concluded that Mr. Iliades's conduct was misuse, MCL 600.2947(2) permits recovery if the "misuse" was "reasonably foreseeable". In this case, it was readily foreseeable that an operator would reach into the press, at the end of the cycle, to retrieve a part ejected by the press.

The meaning of "foreseeability" was established by the Supreme Court in Comstock v General Motors, 358 Mich 163, 180 (1959):

> " The law does not require precision in foreseeing the exact hazard or consequence which happens. It is sufficient if what occurred was one of the kind of consequences which might reasonably be foreseen."

The numerous reported cases discussed in sub-section B attest to the foreseeability that a press operator, in the course of work, will reach into the press area where body parts can be crushed. Many cases arise from a plaintiff's attempt to reach parts, just like here. See e.g. Gregory; Ghrist; Pippen; and Krol.

The very nature of Plaintiff's job required him to reach into the area to remove parts after the cycle was completed (Preston dep., pp. 18-21; Whiteside dep., pp. 14-15; Green dep., p. 17). With a press that sometimes ejected pieces, it was foreseeable, even necessary, to reach into the area to retrieve them. It was a part of the job to reach into the

area, and the safety rules Plaintiff is accused of violating were designed for that very process.

The fundamental reality that press workers' bodies are in the danger area was not lost on a sophisticated press manufacturer like Dieffenbacher. The original safety doors were provided for the very purpose of preventing the press from cycling with an operator's body in the way, as in removing materials (Bramaru dep., pp. 34-35, 40, 47). The replacement light curtain was installed for the same purpose. It was not only "foreseeable" that a worker's body would enter the danger area, the very purpose of the light curtain was to avoid injury if that occurred.

Like the trial judge and Defendant, the dissenting Court of Appeals Judge seemingly looked only to the way Plaintiff attempted to remove the fallen part. The exact movement or reason why the operator's body might get in the way is beside the point. The press injury cases show a variety of ways and reasons workers are put at risk. As Mr. Brumaru apparently agrees (Brumaru dep., p. 73) with Mr. Barnett, the role of a safety engineer is to make the product reasonably safe for different ways the operator may be put at risk. As Comstock stresses, the "foreseeability" requirement is met, so long as the case involves "one of the kind of consequences which might reasonably be foreseen".

In the final analysis, Defendant is not immune from liability for the defective design of the light curtain which failed to provide protection to Plaintiff as he passed that curtain. The summary disposition was correctly reversed by the Court of Appeals.

## RELIEF SOUGHT

WHEREFORE, Plaintiff STEVEN ILIADES and JANE ILIADES pray that this Honorable Court deny Defendant-Appellant's Application for Leave to Appeal.

Respectfully Submitted,

**BENDURE & THOMAS, PLC**

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Dated: November 15, 2016